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8
9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

11 IGNACIO PEREZ, on Behalf of
12 Themselves and all Others Similarly
Situating,

13 Plaintiffs,

14 v.

15 RASH CURTIS & ASSOCIATES,

16 Defendant.

Case No.: 4:16-cv-03396-YGR JSC

**TRIAL BRIEF ON STANDARDS RE:
TREBLE DAMAGES**

TRIAL DATE: May 6, 2019

TIME: 8:00 a.m.

DEPT: 1, 4th Floor

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18
19 On Friday, May 10, 2019, the Court ordered Defendant Rash Curtis to provide
20 briefing on the standards applicable to the willfulness phase of this trial, if necessary.

21 **ANALYSIS**

22 The Telephone Communication Protection Act (TCPA) is found at 47 U.S.C. §§
23 227(a), *et seq.* Section 227(b)(3)(A) provides:

24 *If the court finds that the defendant willfully or knowingly violated this*
25 *subsection, or the regulations prescribed under this subsection, the*
26 *court may, at its discretion, increase the amount of the award to an*
27 *amount equal to not more than 3 times the amount available under*
subparagraph (B) of this paragraph.

28 A jury determines how many TCPA violations have occurred. *See, e.g., City*

1 *Select Auto Sales Inc. v. David Randall Associates, Inc.*, 885 F.3d 154, 157 (3rd Cir.
2 2018) (the jury determines whether the defendant is liable). For non-willful violations,
3 the damages are based on the number of violations found by the jury. *See, e.g., Golan v.*
4 *Veritas Entertainment, LLC*, 2017 WL 3923162, at *2 (E.D. Mo. Sept. 7, 2017).

5 The court, however, determines whether any violation is “willful or knowing”
6 within the meaning of the TCPA. *See* 47 U.S.C. § 227(b)(3). It has the discretion to
7 award additional damages, but it is not required to do so by the plain language of the
8 statute.

9 The terms “willful” and “knowing” are not defined under the statute. In *Pieterston*
10 *v. Wells Fargo Bank, N.A.*, 2018 WL 4039972 at *4 (N.D. Cal. August 8, 2018), the court
11 discussed how there is a split of authority as to what constitutes a willful/knowing
12 violation of the TCPA:

13 Treble damages are allowed when a party “willfully
14 or knowingly” violates the TCPA. *See* 47 U.S.C. §
15 227(b)(3), (c)(5). The courts are split on what
16 constitutes willful or knowing conduct under the
17 statute. *See Trindade v. Reach Media Grp., LLC*,
18 2014 WL 3572132, at *5 n. 59 (N.D. Cal. July 18,
19 2014) (“The court observes that a split in authority
20 exists regarding what qualifies as ‘knowing’ conduct
21 warranting trebling.”) (citing *J2 Global Commc'ns,*
22 *Inc. v. Blue Jay Inc.*, 2009 WL 4572726, at *7 (N.D.
23 Cal. Dec. 1, 2009)). “Some courts have held that a
24 defendant must know that the making of the call
25 violates the TCPA, while others have held that a
26 defendant need only know that the call is being
27 made.” *Id.* The case law may favor the latter
28 interpretation, although the appropriate test is not
well settled. *See Roylance v. ALG Real Estate Servs.,*
Inc., 2015 WL 1522244, at *10 (N.D. Cal. Mar. 16,
2015) (“Although neither the TCPA nor the FCC
regulations define the terms ‘willfully or knowingly’
... courts have generally interpreted willfulness to
imply only that an action was intentional.”) (quoting

1 *Sengenberger v. Credit Control Servs., Inc.*, 2010
2 WL 1791270, at *6 (N.D. Ill. May 5, 2010)).

3 As there is authority going both ways on the evidence
4 that is necessary to establish willfulness and this
5 Court has not ruled on the issue, it will not preclude
6 discovery on the issue of willfulness under the stricter
7 test which requires that Defendant had knowledge
8 that its conduct violates the TCPA. *See Donnelly v.*
9 *NCO Financial Sys., Inc.*, 263 F.R.D. 500, 505 (N.D.
10 *Ill.* 2009); *O'Shea v. Am. Solar Sol., Inc.*, 2016 WL
11 701215, at *5, 7 (S.D. Cal. Feb. 18, 2016); *Mey v.*
12 *Enter. Fin. Grp., Inc.*, 2016 WL 9110357, at *7-8
13 (N.D. Fla. July 27, 2016); *Meredith v. United*
14 *Collection Bureau, Inc.*, 2016 WL 6649279, at *6-7
15 (N.D. Ohio Nov. 10, 2016); *Kane v. Nat'l Action Fin.*
16 *Servs., Inc.*, 2012 WL 1658643, at *2-3, 8 (E.D.
17 Mich. May 11, 2012). Accordingly, the discovery
18 requested is relevant.

19 In *United States v. Liu*, 731 F.3d 982, 985 (9th Cir. 2013), in the context of
20 copyright infringement, the discussion of willful/known is closely analogous.

21 “Liu's guilt turns on whether he acted “willfully” and
22 “knowingly.” We hold that the term “willfully”
23 requires the government to prove that a
24 defendant knew he was acting illegally rather than
25 simply that he knew he was making copies.” *Id.*

26 A District Court further appears to have discretion to reduce a class action award to
27 less than \$500 per violation if it is “so severe and oppressive as to be wholly
28 disproportionate to the offense and obviously unreasonable.” *Golan, supra*, 2017 WL
29 3923162, at *3 (quoting *Capital Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 907 (8th
30 Cir. 2012); *see also St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67, 40 S.Ct.
31 71 (1919) (Congress possesses wide discretion to impose statutory damages, and only
32 damages that are “so severe and oppressive as to be wholly disproportioned to the offense
33 and obviously unreasonable” are prohibited). In this regard, the *Golan* court awarded
34 only \$10 per violative call, finding that amount was sufficient to vindicate the policies

1 underlying the TCPA, but not obviously unreasonable and wholly disproportionate to the
2 offense. *Golan, supra*, 2017 WL3923162, at *4.

3 In *Heindorn v. BDD Marketing & Management Co., LLC*, 2013 WL 6571168 at *3
4 (N.D. Cal. 2013), this Court wrote:

5 The TCPA allows a court, *in its discretion* to “increase the amount of
6 the award to an amount equal to not more than 3 times the amount
7 available under subparagraph (B) of this paragraph,” which provides
8 for recovery of “actual monetary loss from such a violation, or . . . \$500
9 in damages for each such violation, whichever is greater.” 47 U.S.C. §
10 227(c)(5)(B). Here, Plaintiff seeks treble the \$500 amount of statutory
11 damages for 22 telephone calls is sufficient to accomplish the purposes
12 of the TCPA.

13 *Id.*, at *3. This Court continued:

14 To the extent that Plaintiff argues that trebling provisions serve the
15 purposes of incentivizing private lawsuits and compensating plaintiffs
16 for willful violations, Plaintiff provides no reason for why these
17 purposes are not achieved with the base damages award of \$500.

18 For these reasons and based on the discretion afforded this Court under
19 the TCPA, the Court elects not to treble damages under 47 U.S.C. §
20 227(c)(5)(B).

21 With respect to debt collectors dialing a wrong number, courts have found no
22 “willful or knowing” violation unless the call is placed after the collector is told that it is
23 dialing the wrong number. This is true even when the number was obtained through skip
24 tracing. See, e.g., *Echevvaria v. Diversified Consultants, Inc.*, 2014 WL 929275, at *11
25 and *passim* (S.D.N.Y. Feb. 28, 2014) (a debt collector placed twenty-six calls to a skip-
26 traced number belonging to someone other than the debtor, and was found to have
27 violated the TCPA for each call but only after the first call, where it was informed it was
28 dialing the wrong number, did it act “willfully or knowingly”); see also *Harris v. World*
Fin. Network Nat’l Bank, 867 F.Supp.2d 888, 895 (E.D. Mich. 2012) (“prior to Plaintiff
notifying Defendants [that they were dialing the wrong number], Defendants could not
have known that the Plaintiff’s [cell] number was not [the debtor’s] phone number.

1 Without knowing that the number associated with [the debtor’s] account was actually
2 Plaintiff’s number, Defendants’ violations cannot be deemed willful or knowing.”).

3 As noted, a District Court has discretion *not* to treble TCPA damages, even where
4 the court finds knowing or willful violations. *See, e.g., Heidorn, supra*, at *2.

5 Many courts which have specifically looked at “wrong number” cases have
6 followed *Harris v. World Fin. Network Nat. Bank*, 867 F. Supp. 2d 888 (E.D. Mich.
7 2012), where the court reasoned that a defendant could not have known their conduct
8 would violate the TCPA if they did not know they were calling the wrong number. As
9 such, no “knowing or willful” violation occurred until defendant was told it was calling
10 the wrong number.

11 Outside of the specific context of “wrong number” cases, many courts have
12 followed the Supreme Court of Ohio in *Charvat v. Ryan*, 879 N.E.2d 765 (2007), which
13 found the appropriate standard is whether the defendant consciously and deliberately
14 committed or omitted an act that violated the TCPA. *Id.* at 771. *Charvat* presents the
15 test for treble damages as two-pronged: (1) whether the conduct was a “knowing or
16 willful” violation of the TCPA, and (2) whether treble damages are “appropriate” in the
17 particular case. *Accord Heidorn, supra*, at *3.

18 Other courts have interpreted “willfully or knowingly” under the TCPA to mean
19 that the defendant must have had reason to know or should have known that the conduct
20 would violate the TCPA. *See Bridgeview Health Care Ctr. Ltd. v. Clark*, 2013 WL
21 1154206 at *7 (N.D. Ill. Mar. 19, 2013).

22 In still other TCPA cases against debt collectors, courts have analyzed each
23 element of the prima facie case independently to determine whether it was committed
24 “knowingly or willfully.” *See Echevvaria v. Diversified Consultants, Inc.*, 2014 WL
25 929275 (S.D.N.Y. Feb. 28, 2014). There, the court required the plaintiff to show that the
26 defendant had actual knowledge that the defendant lacked consent in order to find willful
27 and knowing violations. *See also Manuel v. NRA Grp., LLC*, 200 F. Supp. 3d 495 (M.D.
28 Pa. 2016). There, the court required the plaintiff to show that the defendant had actual

1 knowledge that the defendant was calling a cellular phone and not a landline.

2 In *Charvat, supra*, unauthorized pre-recorded voice messages were being used to
3 solicit business. The Ohio Supreme Court analyzed “knowing” and “willing” separately.
4 The court determined that even when a violation is found to be “knowing or willful,” the
5 court has discretion not to award treble damages.

6 The court in *Charvat* concluded that the “knowing” and “willful” standards under
7 the TCPA do not differ:

8 “[T]o establish a willful violation of the TCPA for an award of
9 treble damages, a plaintiff must prove that the defendant
10 *consciously and deliberately committed or omitted an act that*
11 *violated the statute, irrespective of any intent to violate the law.*
12 In principle then, the *two standards of ‘knowingly’ and ‘willfully’*
within the TCPA do not differ.”

13 *Id.* After finding that “knowing” and “willful” are functionally the same under the TCPA,
14 the court remanded so trial court could apply the correct two-part test:

15 “[A] two-part test is presented for the trial court to employ when
16 ascertaining *whether treble damages are appropriate* in a
17 particular case. *First, the court must decide whether a violation*
18 *was ‘knowing’ or ‘willful.’ Then the court may, but need not,*
19 *award treble damages.*”

20 *Id.* (original italics, other emphasis added).

21 In *Texas v. Am. Blastfax, Inc.*, 164 F. Supp. 2d 892 (W.D. Tex. 2001), the State of
22 Texas sued defendant mass fax advertiser for TCPA violations. Defendants built their
23 database of phone numbers by taking fax numbers from phone books, computer
24 programs, public sources, and buying lists of fax numbers from third parties. The Court
25 held:

26 “Although the TCPA provides for liquidated damages of \$500 for
27 each violation, the Court finds *it would be inequitable and*
28 *unreasonable to award \$500 for each of these violations.*⁸ The

1 Court therefore will interpret the provision as providing for “up
2 to” \$500 per violation...Because the defendants' conduct was
3 willful and knowing for the final month, from February 9, 2001
4 to March 15, 2001, the Court exercises its discretion under the
5 TCPA and trebles these damages, to \$196,875. The defendants'
6 total TCPA damages, therefore, are \$459,375.”

7 *Id.* at 900-901 (emphasis added). In fn. 8, the court noted if it awarded damages strictly as
8 prescribed by the TCPA, it would amount to an award of about \$2.34 billion against two
9 individuals and a fifteen-employee company.

10 Similarly, the Fourth Circuit affirmed the findings of the district court in *Maryland*
11 *v. Universal Elections, Inc.*, 729 F.3d 370 (4th Cir. 2013), a case where the State of
12 Maryland sued a company that made over 112,000 anonymous prerecorded calls to
13 Maryland voters on election day. In the underlying ruling by the district court in
14 *Maryland v. Universal Elections, Inc.*, 862 F. Supp. 2d 457 (D. Md. 2012), the court
15 applied the *Texas v. Am. Blastfast* test of whether defendant had reason to know, or
16 should have known, that his conduct would violate the TCPA. The court found “knowing
17 and willful” violations, but in exercising its discretion under the TCPA, did not award full
18 treble damages. The court found:

19 “While the TCPA's damages provisions appear constitutional on
20 their face, damages may become unconstitutional as applied in
21 an individual case. In such situations, a damages award may
22 violate due process or constitute an ‘excessive fine’ under the
23 Eighth Amendment. *See Pasco*, 826 F.Supp.2d at 837–
24 38 (citing *Browning–Ferris Indus. of Vt., Inc. v. Kelco Disposal,*
25 *Inc.*, 492 U.S. 257, 264–65, 109 S.Ct. 2909, 106 L.Ed.2d 219
26 (1989)); *see also Korangy v. U.S. F.D.A.*, 498 F.3d 272, 277 (4th
27 Cir.2007)...For example, in *Texas v. Am. Blastfax, Inc.*, the court
28 found that an award of approximately \$2.34 billion ‘would be
inequitable and unreasonable.’ 164 F.Supp.2d at 900.”

Maryland v. Universal Elections, Inc., 862 F.Supp.2d at 465 (original italics and
underline, other emphasis added).

1 In *Bridgeview Health Care Ctr. Ltd. v. Clark*, 2013 WL 1154206 (N.D. Ill. Mar.
2 19, 2013), the court declined to follow the *Texas v. Am. Blastfast* standard for “knowing
3 or willful,” noting that:

4 “[I]t appears that no court has interpreted this provision as
5 requiring a ‘reason to know’ and then found for the
6 defendant. See *id.*; *American Blastfax*, 164 F.Supp.2d at 899.”

7 *Bridgeview, supra*, at *7 (original italics and underline, other emphasis added). The court
8 in *Bridgeview* declined to award treble damages despite finding willful and knowing
9 conduct:

10
11 “A Court may treble the damage for a willful violation of the
12 statute. 47 U.S.C. § 227(b)(3)(C). However, in this case the Court
13 determines that no enhanced damages are appropriate.
14 Defendant is a small business with the normal desire to increase
15 its business.”

16 *Bridgeview, supra*, at *8 (original underline, other emphasis added).

17 In “wrong number” cases, courts have found that the defendant has not “knowingly
18 or willfully” violated the TCPA until defendant had actual knowledge they were calling
19 the wrong number. See *Harris v. World Fin. Network Nat. Bank*, 867 F. Supp. 2d 888
20 (E.D. Mich. 2012).

21 “In order for Plaintiff to prove that Defendants knew that they
22 acted in a manner that violated the statute ... Plaintiff must also
23 show that Defendants knew that Plaintiff did not consent to the
24 phone calls. In this case, prior to Plaintiff notifying Defendants
25 [that Defendants were calling the wrong number]...Defendants
26 could not have known that Plaintiff's 1233 number was not
27 Morgan's phone number. Without knowing that the number
28 associated with Morgan's account was actually Plaintiff's
number, Defendants' violations cannot be deemed willful or
knowing.”

1 *Id.* at 895 (emphasis added). The court in *Harris* reasoned that a broader application of
2 “willful or knowing” *that* would impose treble damages on defendants who were unaware
3 they were calling a wrong number would diminish the statute’s distinction between
4 violations that do not require an intent, and those that Congress intended to punish more
5 severely.

6 Other courts have followed the reasoning in *Harris*. See, e.g., *Warnick v. Dish*
7 *Network LLC*, 2014 WL 12537066 (D. Colo. Sept. 30, 2014).

8 In another wrong number/debt collection case, *Echevvaria v. Diversified*
9 *Consultants, Inc.*, 2014 WL 929275 (S.D.N.Y. Feb. 28, 2014), the court applied *Harris*:

10 “Prior to [plaintiff] notifying [defendant] that she was not
11 [debtor], [defendant] could not have known that it was calling
12 [plaintiff] without consent. Accordingly, the first phone call to
13 [plaintiff] was not in willful or knowing violation of the
14 TCPA. See *Harris v. World Fin. Network Nat'l Bank*, 867
15 F.Supp.2d 888, 895 (E.D.Mich.2012); *Whaley v. T-Mobile, USA,*
16 *Inc.*, No. 13–31, 2013 WL 5155342 at *3 n. 4 (E.D.Ky. Sept.12,
17 *2013).* However, the remaining twenty-six calls were made after
18 [plaintiff] informed [defendant] on February 1, 2013 that she was
19 not [debtor]. *The Court therefore finds that an award of treble*
20 *damages for the twenty-six post-notification calls is*
21 *appropriate.*”

22 *Echevvaria, supra*, at *11 (original italics and underline, other emphasis added).
23 The court, finding no willful or knowing violation of the TCPA absent actual knowledge
24 that the wrong number was being dialed when the collector was calling the number
25 received from the original creditor, relied on an Eleventh Circuit decision.

26 In another TCPA case against a debt collector, on cross-motions for summary
27 judgment the court in *Manuel v. NRA Grp., LLC*, 200 F. Supp. 3d 495 (M.D. Pa. 2016)
28 found that, in order to award treble damages, each element of an alleged TCPA violation
would require a factual showing of volitional conduct:

1 “Courts have generally [required] evidence of volitional
2 conduct for each element of liability, irrespective of any intent
3 to transgress the Act's prohibitions. See Lary v. Trinity
4 Physician Fin. & Ins. Servs., 780 F.3d 1101, 1107 (11th
5 Cir.2015); Davis v. Diversified Consultants, Inc., 36 F.Supp.3d 2
6 17, 226–27 (D.Mass.2014) (collecting cases); cf. Echevvaria v.
7 Diversified Consultants, Inc., No. 13–CIV.4980–LAK–AJP,
8 2014 WL 929275, at *9 (S.D.N.Y. Feb. 28, 2014).”

9 *Manuel, supra*, at 502 (some emphasis added).

10 In *Davis v. Diversified Consultants, Inc.*, 36 F. Supp. 3d 217 (D. Mass. 2014), the
11 court found that factual issues precluded a summary judgment on treble damages:

12 “Defendant did not acquire plaintiff's telephone number from its
13 client, as a number associated with the debtor, but instead from
14 a third-party service provider. Even assuming that the subscriber
15 of that number was the debtor, it was not the number she had
16 provided to defendant's client; defendant therefore could not
17 reasonably have believed that it had her consent to call that
18 number...On the other hand, defendant has asserted that it acted
19 in good faith...and that it took steps to scrub cellular telephone
20 numbers from its system so as not to violate the TCPA...The
21 evidence presented here is not so clear and one-sided as to the
22 alleged willfulness of defendant's conduct that reasonable jurors
23 could come to only one conclusion.”

24 *Id.* at 227 (emphasis added).

25 Respectfully submitted.

26 Dated: May 12, 2019

27 ELLIS LAW GROUP LLP

28 By /s/ Mark E. Ellis

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